In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 251

HENRY C. WILSON AND EDITH Y. EDWARDS, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF LEWIS G. YOUNG, DECEASED, PETITIONERS

v.

FRANK W. KRAEMER, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF CONNECTICUT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 88-92) is reported at 97 F. Supp. 627. The opinion of the Court of Appeals (R. 107-111) is reported at 190 F. 2d 341.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1951 (R. 112-113). The petition

for a writ of certiorari was filed on August 17, 1951. An amending petition was filed on September 4, 1951, and the brief in support of that petition was filed on September 14, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether, under Section 811(f) of the Internal Revenue Code, as amended by Section 2 of the Powers of Appointment Act of 1951, the corpus of two trusts, over which the decedent had a power of appointment, is includible in his gross estate for purposes of the federal estate tax. The answer depends upon whether such power was exercised by the decedent within the meaning of Section 811(f) as so amended.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra,* pp. 14-17.

STATEMENT

This is an action for the recovery of estate taxes paid (R. 2, 22, 88). The facts were largely stipulated (R. 59-87) and the case was tried without a jury (R. 1). The District Court made special findings of fact (R. 93-102) and conclusions of law (R. 102), and directed the entry of judgment dismissing the complaint (R. 102, 103). The taxpayers appealed to the Court of Appeals for the Second Circuit (R. 104) which affirmed (R. 112).

The District Court found the following facts (R. 93-102):

The taxpayers are the duly qualified and acting

executors of the estate of Lewis G. Young, deceased (R. 93). The decedent was born on August 12, 1882. He was married to Ruth Read on May 25, 1918, and their daughter, Edith Joan Young, was born on March 6, 1919. She is now married to Kenneth Edwards. (R. 93.)

On July 26, 1930, Minnie E. Young, the mother of the decedent, who was then a resident of New York City, executed and delivered an indenture of trust wherein and whereby she granted and conveyed to the Central Hanover Bank & Trust Company and Francis B. Upham, Jr., as trustees, certain property. This trust is hereinafter referred to as the *inter vivos* trust. (R. 93.)

The *inter vivos* trust contains the following (R. 93-94):

> To hold, invest and reinvest the trust estate for and during the lifetime of the Grantor's said son, Lewis G. Young, residing in Bronxville, Westchester County, New York, and to pay over the net annual income of and from same to the Grantor's said son in monthly payments for and during the term of his natural life; and, upon his death, to transfer, assign and pay over the trust estate then held for him to such persons and upon such estates, in trust or otherwise, as he may by his last will and testament validly appoint, or, in case he shall fail to make such valid disposition or appointment of the trust estate so held for him, in whole or in part, then to pay over said trust estate, or any part thereof which may not have been validly disposed of by appointment, to

> the descendant or descendants of the Grantor's said son him surviving, in equal shares, per stirpes and not per capita, absolutely and forever; but if the Grantor's said son shall have left no descendant or descendants him surviving, then to pay over said trust estate to the Grantor's daughter, Edna Y. Brenchley, residing in the Borough of Manhattan, City, County and State of New York, absolutely and forever.

On October 20, 1931, the mother died a resident of New York City (R. 94).

On January 9, 1932, the mother's will was duly admitted to probate in the Surrogate's Court, County of New York (R. 94). By paragraph 8(b) of the will, a trust was established for the benefit of her son, the decedent, as follows (R. 94-95):

> To hold, invest and reinvest the other half of such other equal part of my said residuary estate for and during the lifetime of my said son, Lewis Ginter Young, in case he shall survive me, and to pay over the net income of such one-half of such equal part to my said son in equal monthly payments for and during the term of his natural life, and upon his death to transfer, assign and pay over the principal of the share so held in trust for him, to such persons and upon such estates, in trust or otherwise, as he may by his last will and testament validly appoint, or, in case he shall not survive me, or shall fail to make valid disposition or appointment of the share so held in trust for

him, in whole or in part, to pay over the principal of the said trust fund to the surviving descendant or descendants of my said son, in equal shares, per stirpes and not per capita, absolutely and forever; but, if there shall be no surviving descendant or descendants of my said son, then I direct that the principal of the share so held in trust for my said son shall be paid over to my said daughter, Edna Y. Brenchley, absolutely and forever; and I give, devise and bequeath the same accordingly.

That trust is hereinafter referred to as the testamentary trust (R. 95).

At the time (a) of the creation of the *inter vivos* trust and (b) of the death of the mother, the decedent was a resident of and domiciled in the County of Westchester, State of New York, and continued to be such until in or about February, 1936, when he removed to the Town of Sherman, State of Connecticut, and thereafter and until his death, he resided and was domiciled there (R. 95).

The will of the decedent contains the following provisions (R. 95, 97-98):

FOURTH. Pursuant to the power of appointment and disposition given me by my mother, and as expressed in the third clause hereof, I give and bequeath to

A. Roy M. Allen of Bloomfield, New Jersey, the sum of eight thousand dollars ($8,000.00)

B. Robert Dennis of Milford, Connecticut,

the sum of six thousand five hundred dollars ($6,500.00)

C. Henry C. Wilson of the Law Firm of Wilson & Hanna, Danbury, Connecticut, the sum of six thousand dollars ($6,000.00) in lieu of executors fees

D. Kathleen Brush of Mount Vernon, New York, one thousand dollars ($1,000.00)

E. Edna Y. Oldren of Darien, Connecticut, the sum of one dollar ($1.00)

F. My daughter Edith Joan Young all the rest, residue and remainder of the trust funds created by my mother under the deed of trust dated January 30, 1931, but made as of July 26th, 1930, and under her last Will and Testament dated July 26th, 1930, and now held by The County Trust Company of White Plains, New York, as surviving successor trustee, and two thirds of my separate estate both real and personal.

Edith Young Edwards, who is the decedent's sole descendant (R. 99), on August 30, 1944, executed and delivered to the County Trust Company, as trustee under the *inter vivos* trust, an instrument which read in part as follows (R. 99-100):

> With respect to the distribution and payment of the principal of the above mentioned trust upon the death of Lewis G. Young, the life tenant mentioned therein, please be advised that I have declined and do hereby decline the appointment of such principal, or any part thereof, purported to be made to me by paragraph Third of the last will and testament of

> the said life tenant, Lewis G. Young, and have elected and do hereby elect to take such principal or such part thereof to which I may be entitled pursuant to the provisions of the said trust indenture vesting the same in me as the sole descendant of said Lewis G. Young upon his failure to make a valid disposition or appointment thereof, and I hereby demand that pursuant to the provisions of the said trust indenture you deliver and pay to me the same, or such part thereof to which I am entitled.

On February 5, 1945, Edith Young Edwards executed and delivered to the County Trust Company, as trustee of the testamentary trust, a similar instrument (R. 100-101).

The corpus of the two trust estates was delivered to Edith Young Edwards by the County Trust Company as trustee, long after the delivery of the instruments referred to in the two preceding paragraphs (R. 102).

The amounts paid to others than Mrs. Edwards from the trust estates were delivered to them by the County Trust Company as trustee subsequent to the delivery to Mrs. Edwards of her portion (R. 102).

Upon the basis of these findings, the District Court held (R. 102) that the value of the *inter vivos* and testamentary trusts is includible in the decedent's gross estate for purposes of the federal estate tax. The Court of Appeals affirmed (R. 107-113).

ARGUMENT

1. This case was decided by the Court of Appeals on June 4, 1951, and, since that time, the applicable law has been amended by the Powers of Appointment Act of 1951, Public Law 58, 82d Cong., 1st Sess., approved June 28, 1951. The pertinent provisions of the amendments are set out in the Appendix, *infra,* pp. 14-15. By the terms of the Act, its provisions are effective as if made by Section 403 of the Revenue Act of 1942 on the date of its enactment (*i.e.,* applicable with respect to estates of decedents dying after October 21, 1942). The instant decedent died on January 12, 1944 (R. 93), and therefore the amendments are applicable here.

Under the amendments, there is not a shadow of a doubt as to the propriety of the tax here. Section 811(f)(1) of the Code as so amended provides for the inclusion in the gross estate of property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent by will; but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. And the report of the Senate Committee on Finance (S. Rep. No. 382, 82d Cong., 1st Sess., pp. 2, 3) reads in part as follows:

> The bill would take effect as if its provisions had originally been contained in the 1942 act. It would apply to the estates of decedents dying after October 21, 1942, and to gifts made on or after January 1, 1943.

The bill treats powers created before the effective date of the 1942 act ("preexisting powers") separately from those created thereafter ("future powers"). Before the 1942 act only the exercise of a general power of appointment was taxable. The 1942 act taxed the exercise of such powers, and also the possession of unexercised general powers, the exercise of many limited powers, and the possession of those limited powers although unexercised. It applied to powers already in existence as well as to those to be created in the future. As to powers created before the 1942 act, the bill in substantial effect restores the law as it existed prior to 1942, with one minor change, to eliminate the "passing" problem.

* * * * *

Discussion of Specific Provisions

Section 1 of the bill amends section 811(f) of the code, relating to estate tax on powers of appointment. The new section 811(f)(1) deals with preexisting powers, i.e., powers created on or before October 21, 1942, the date of enactment of the 1942 act. As to such powers it restores the situation which existed prior to that date, i.e., only the exercise of a general power of appointment is taxed. An amendment by your committee makes it clear that a complete release of a preexisting power at any time is not taxable.

The former statute taxed property "passing" under a general power of appointment

> *exercised by the decedent. This sometimes gave rise to litigation where the decedent appointed part or all of the property to persons who would also have taken it under the terms of the original instrument creating the power. The bill eliminates this possibility by taxing all property with respect to which the decedent has "exercised" a general power of appointment.*
>
> With this exception, the intent of the bill is to restore the law regarding preexisting powers as it existed prior to the 1942 act. [Italics supplied.]

The foregoing excerpts from the Senate report show clearly that a power to appoint is exercised within the meaning of the statute where the property subject thereto is appointed to the taker in default of appointment, regardless of whether or not the appointed interest and the interest in default of appointment are identical, and regardless of whether or not the appointee renounces any right to take under the appointment. See also H. Rep. No. 327, 82d Cong., 1st Sess., p. 4, which contains the same language we have italicized above.

This effectively and completely disposes of the taxpayers' argument (Pet. 9-28) that a power has not been exercised where there is a mere echo of the limitations over upon default.[1]

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[1] The petition for certiorari, filed about six weeks after the enactment of the Powers of Appointment Act of 1951, makes no mention of it. In their amending petition and brief in support of it, the taxpayers recognize that the new law is applicable here and they undertake to show that it supports

2. Moreover, the Government does not intend to intimate that the result would be any different under the provisions of Section 403(d)(3) of the Revenue Act of 1942 (Appendix, *infra,* p. 16), which was construed by the courts below. Both the District Court (R. 92) and the Court of Appeals (R. 109-110) approved the regulation (Treasury Regulations 105, Section 81.24, as amended, Appendix, *infra,* pp. 16-17), promulgated under the 1942 Act, which provides for taxation in a case like that at bar. As pointed out by both courts below (R. 92, 109-110), the fact that this regulation was outstanding during repeated amendments to Section 403(d)(3) indicates Congressional approval.[2] *Morgan* v. *Commissioner,* 309 U. S. 78, 81. The regulation is consistent with what was said by this Court in *Helvering* v. *Grinnell,* 294 U. S. 153, 155, and *Helvering v. Safe Deposit Co.,* 316 U. S. 56, 65, both of which were decided prior to promulgation of the regulation in 1943. See T. D. 5239, 1943

their views. That undertaking is futile. While taxpayers refer to the committee reports, they do not mention or discuss the relevant provisions that we have set out above. Instead, they set out (Br. 4-5) certain excerpts from the Congressional Record which are entirely consistent with our views when read in conjunction with the committee reports.

[2] In their amending papers (Am. Pet. 2, Br. 4), the taxpayers say that the Congressional debates with respect to the 1951 law show that Congress was never satisfied with the 1942 law, and, therefore, the amendments which the courts below relied upon cannot be considered to indicate approval of the regulation. But however that may be with respect to other provisions of the 1942 law with which we are not here concerned, it is plain from the 1951 committee reports that we have referred to above that Congress was at all times after 1942 satisfied with the provision of the Regulations which concerns us here.

Cum. Bull. 1081, 1089. It is true that after promulgation of the regulation, this Court, in deciding *Estate of Rogers* v. *Commissioner,* 320 U. S. 410, said (page 415) that where a donee of a power merely echoes the limitations over upon default he may well be deemed not to have exercised his power. But, as pointed out by the court below (R. 110), that dictum related to "passing" under the pre-1942 law, and it has no bearing on the validity of the regulation issued under the 1942 law which was designed to eliminate the problem as to passing. In their petition for certiorari (Pet. 3, 16, 17, 18, 19, 21) and brief in support of amending petition (Br. 5-6), the taxpayers rely heavily upon the *Rogers* case. But for the reasons given above and in the opinion of the Court of Appeals, we submit that such reliance is misplaced.[3]

3. Finally, as the Court of Appeals noted (R. 111), there was, in any event, more than a mere echo by the decedent here, and he made a disposition of the appointive property different from that provided by the trust instruments in default of exercise of the power. He exercised his power of appointment (R. 97) so as to make five specific money bequests,[4] aggregating $21,501 in amount, to

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[3] In *Estate of Rogers* v. *Commissioner,* 320 U.S. 410, 414, this Court ruled that "whether by a testamentary exercise of a general power of appointment property passed under § 302(f) is a question of federal law * * *." Contrary to petitioner's suggestion (Pet. 18-19), the question whether a power was exercised, as it is here involved, is no less one of federal law. See 320 U.S. at 413-414.

[4] The taxpayers conceded taxability with respect to these items (Pet. 8).

individuals not mentioned by his mother, and to give the remainder of the appointive property to his daughter, the taker in default of appointment. Therefore, under this Court's actual decision in the *Rogers* case—on a dictum in which petitioners so heavily rely—the decedent unquestionably exercised his power, and the appointive property would be includible under the law as it existed both prior to the 1942 amendments and thereafter. 320 U. S. 410, 413; *Guaranty Trust Co. of New York* v. *Johnson*, 165 F. 2d 298 (C. A. 2d).

CONCLUSION

Since the decision of the Court of Appeals, which conflicts with no other, was rendered in this case, the law has been amended so as unquestionably to support the tax. The meaning of the law as it stood prior to its 1951 amendment now raises only academic questions. The taxpayers in their amending papers admit the applicability of the new law, and, in the circumstances, there is no basis whatsoever for the granting of the petition for certiorari.

Respectfully submitted,

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OCTOBER, 1951.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(f) [as amended by Section 2 of the Powers of Appointment Act of 1951, Public Law 58, 82d Cong., 1st Sess.] *Powers of Appointment.*

(1) *Property with Respect to Which Decedent Exercises a General Power of Appointment Created on or Before October 21, 1942.*—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent (1) by will or (2) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under subsection (c) or (d); but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Powers of Appointment Act of 1951, Public Law 58, 82d Cong., 1st Sess.:

SEC. 2. ESTATE TAX-POWERS OF APPOINTMENT.

* * * * *

(c) *Effective Date.*—The amendments made by this section shall be effective as if made by section 403 of the Revenue Act of 1942 on the date of its enactment (applicable with respect to estates of decedents dying after October 21, 1942).

SUPERSEDED PROVISIONS

Internal Revenue Code:

SEC. 811. * * *

(f) [as amended by Sec. 403(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Powers of Appointment.*—

(1) *In General.*—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, * * *

(2) *Definition of Power of Appointment.*—For the purposes of this subsection the term "power of appointment" means any power to appoint exercisable by the decedent either alone or in conjunction with any person, except

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 401. ESTATES TO WHICH AMENDMENTS APPLICABLE.

Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act. [October 21, 1942.]

SEC. 403. POWERS OF APPOINTMENT.

* * * * *

(d) *Powers with Respect to Which Amendments Not Applicable.—*

* * * * *

(3) The amendments made by this section shall not apply with respect to any power to appoint created on or before the date of the enactment of this Act if it is released before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable; or if the decedent dies before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable, and such power is not exercised.

The critical date mentioned in the above statute (January 1, 1943) has been extended by subsequent legislative enactments to July 1, 1951. See Joint Resolution of June 27, 1950, Public Law 578, 81st Cong., 2d Sess.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.24 [as amended by T. D. 5239, 1943 Cum. Bull. 1081, 1087]. *Property subject to power of appointment by decedent.—*

* * * * *

(b) *Estates of decedents dying after October 21, 1942.*—The regulations prescribed under this subsection are applicable only with respect to estates of decedents who died after October 21, 1942, the date of enactment of the Revenue Act of 1942.

(1) *In general.*— * * *

* * * * *

A power to appoint is exercised where the property subject thereto is appointed to the taker in default of appointment, regardless of whether or not the appointed interest and the interest in default of appointment are identical, and regardless of whether or not the appointee renounces any right to take under the appointment.

* * * * *

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